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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANDRE JOSE P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ANDRE JOSE P., Defendant and Appellant.	D037259 (Super. Ct. No. J180650)

APPEAL from a judgment of the Superior Court of San Diego County, Maurice Jourdane, Referee. Affirmed.

After a number of probationary placements failed, the juvenile court revoked Andre Jose P.'s (Andre) probation and committed him to the California Youth Authority (CYA). Andre appeals, arguing (1) it was error for the referee to have imposed such CYA commitment without obtaining a more current social study, and (2) the referee did

not exercise his independent discretion, but merely automatically imposed another judge's previously-stayed CYA commitment of Andre to CYA. We disagree with these assignments of error, and affirm.

FACTUAL BACKGROUND

When Andre was six, there was a referral on his behalf to the Department of Social Services (DSS), but the case was closed. A second physical abuse referral 10 months later resulted in his wardship and placement in foster care for about two years. During his time in foster care, Andre committed over 30 assaults on staff, and in 1997, when he was 10, Andre was determined to be "not amenable to treatment" and, despite the fact his mother was not complying with the treatment plan, Andre was returned to his mother's custody.

The dependency system having given up on Andre when he was 10, Andre began daily marijuana use, and began drinking alcohol regularly. By the time he was 13 he was also a monthly user of methamphetamine, although Andre himself stated "I don't have a drug problem."

On June 16, 1997, when Andre was 13, police responded to his mother's call for protection against her son. While he was being patted down for weapons, Andre said, "I hate you fucking police. You always harass me." Despite use of pepper spray, Andre engaged in a physical confrontation with police officers which, at one point, resulted in Andre's straddling a police officer and punching him repeatedly.

Andre eventually admitted having resisted an executive officer by force and violence, in violation of Penal Code section 69, a felony, and was sent to the Juvenile Correctional Intervention Program (JCIP) for a period not to exceed 240 days.

Andre's behavior at the Juvenile Ranch Facility (JRF) was as atrocious as had been his behavior while in Juvenile Hall, before his placement at JRF. Eventually, as he refused to obey staff directives and threatened to kill staff, Andre was deemed unsuitable for the JCIP/JRF programs. Andre's treating psychiatrist also recommended that Andre not be returned to the ranch program.

Andre spent about six months in Juvenile Hall while being screened for and then rejected by several residential treatment programs. Andre was eventually placed at Helicon Youth Center in May of 1998, as part of a treatment plan which incorporated a reunification plan.

This placement also became untenable, after Andre continued his assaultive behavior, often coupled with unauthorized absences. In 1999, together with two other San Diego county wards, Andre absconded from a court ordered placement at Silverlake-La Hacienda group homes in Mentone, California. A detention order was issued on April 26, 1999.

Upon apprehension, Andre was again detained for a time at Juvenile Hall while an opportunity to reinstate the closed facility placement was sought. Detention at Juvenile Hall continued into December of 1999, when continued custody and renewed participation in reunification and treatment plans was ordered.

On January 25, 2000, the court, on the recommendation of Andre's physician, ordered Andre into the Tower Program, which is designed to provide a wide range of services, including mental health, to its members.

This placement did no more than any of the earlier ones to influence Andre's actions. Released to the custody of his mother, Andre was constantly truant and did not listen to her, and Andre also began testing positive for methamphetamine. Andre continued to hang out with his neighborhood gang, the "Four Corners of the World Homeboys," and participated with his gang in an attempted assault on undercover police officers, as to which no charges were filed. Andre was ordered back into custody at Juvenile Hall on March 10, 2000.

On April 11, 2000, Andre was ordered placed with his father. Andre was soon truant, and again tested positive for methamphetamine usage in both April and May of 2000. On May 15, 2000, the probation officer informed the court that Andre's father had not seen him since May 8, and on May 17, 2000, a bench warrant for Andre's arrest was issued.

On June 10, 2000, Andre and five others grabbed a stereo from a man at a San Diego trolley station. As Andre began to run off carrying the victim's property, the other males threatened to assault the victim if he pursued Andre. When the victim and a cousin later found Andre and a companion of his, Hernandez, in a nearby park, Hernandez pulled out a screwdriver and told Andre to grab a shovel, so the two of them could assault the crime victim and his cousin. As the victim and his cousin drove off, Hernandez and Andre threw rocks at their car. Andre was arrested.

At the time, Andre was still on a grant of juvenile probation. He later admitted a charge of grand theft, and the robbery and rock throwing at a vehicle charges were then dismissed. It was also found true that Andre had failed on probation. On August 28, 2000, Andre was committed to the Youth Correctional Center (YCC) for a period not to exceed one year, and warned that CYA was the only other option.

It took Andre approximately 10 weeks to have himself excluded from YCC. On November 1, 2000, Andre assaulted another ward, Jesus P., in the shower at YCC. Jesus, who owed Andre 25 cents, was an inch shorter and 50 pounds lighter than Andre, and was cut below his eye in the attack, requiring stitches. On November 10, 2000, Andre was excluded from YCC by reason of his violent behavior.

PROCEDURAL BACKGROUND - PRESENT MATTER

On December 1, 2001, a notice of probation violation was filed. On December 8, 2000, Andre admitted the charge. A social study dated that day recommended Andre be committed to CYA, and on January 11, 2001, (despite a lengthy memorandum filed on Andre's behalf arguing for another attempt at parental placement) the court found Andre (1) had violated probation and (2) would likely benefit from a CYA commitment, and the court imposed such. Timely notice of appeal was later filed.

At the disposition hearing on January 11, 2001, the referee indicated he had read the social study recommending CYA placement, as well as another report, and had also reviewed the "Second Memorandum in Support of an Alternative Disposition," filed by the Public Defender a week earlier. Andre's counsel then proceeded to argue for another placement of Andre with his father, while the People stated this was "a clear case for

CYA" if there had ever been one, because Andre had been told in August of 2000 he would go to CYA if he failed his YCC placement, had nonetheless exhibited violent behavior at YCC, and even the psychological evaluation recommended Andre be committed to CYA as a necessary placement.

After considering further argument, the court observed to Andre that "[w]hat this court . . . has been trying to do . . . is keep you out of prison when you are 18." The court then noted that "[r]egarding placing you back at YCC, the fact that you tried it and blew it and Judge McAdam told you if you don't comply with the rules, you are going to CYA, means I'm not going to go against Judge McAdam and say even though you didn't go along with the rules, the court changed its mind; you don't have to go to CYA. [¶] The court does remove you from your home and commits you to CYA. . . ." The court went on to note that "given your age, given the fact you are mentally all here and with us and have a desire hopefully to not end up in prison some day, I think the discipline that i[t] can impose will benefit you. I think you physically, because of your age and size, are able to benefit from CYA. I think that any vocation [and] any education you can get there is going to benefit you."

STANDARD OF REVIEW

A decision by the juvenile court to commit a minor to the CYA will not be deemed to constitute an abuse of discretion where the evidence "demonstrate[s] probable benefit to the minor from commitment to the CYA and that less restrictive alternatives would be ineffective or inappropriate." (*In re George M.* (1993) 14 Cal.App.4th 376, 379.)

DISCUSSION

Andre's arguments center around the points that (a) he was improperly committed to CYA in the absence of a new petition, as Welfare and Institutions Code section 777 formerly, but no longer, requires; (b) the absence of a current social study renders his CYA commitment unlawful; and (c) the referee did in fact not exercise his independent discretion in committing Andre to CYA. We discuss these points in turn.

A. Absence of New (Supplemental) Petition

Andre first argues that it was improper to commit him to CYA without the filing of a new Welfare and Institutions Code section 777 petition, rather than merely the filing of a notice of probation violation.[1] As respondent points out, however, Proposition 21, passed by the voters on March 7, 2000, in section 27 modified the language formerly requiring a supplemental petition to read instead that "an order changing or modifying a

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1 Former Welfare and Institutions Code section 777, subdivision (a), provided that when an order was sought to change the custody status of a minor by placing him in a more restrictive form of custody, including a commitment to CYA, such a change could be made only after a noticed hearing on a supplemental petition. The court could not change the level of custody or lift a stayed commitment order unless it followed "section 777[, subdivision (a)] procedures by: (1) hearing evidence as to the efficacy of the prior disposition, (2) considering independently on the whole record whether the prior dispositional order had entirely failed, and (3) determining if a more restrictive level of confinement was necessary to the minor's rehabilitation." (*In re Jorge Q*. (1997) 54 Cal.App.4th 223, 236.) The standard of proof at the hearing was beyond a reasonable doubt. (*In re Arthur N*. (1976) 16 Cal.3d 226, 236-241.)

previous order by directing commitment to the Youth Authority shall be made only after a noticed hearing."[2] Expressly deleted were the words "upon a supplemental petition."[3]

Andre attempts (largely in the reply brief) to distract us from the plain meaning of the above language, and requests that we read the new statute as including the former section 777 petition requirement. The argument largely rest's upon Andre's reference to West's 2001 supplement to the Welfare and Institutions Code, which inaccurately in section 777, subdivision (a)(2) continues to use the word "petition," which by its context (used in apposition to "notice," which is clearly intended to replace it, rather than complement it) and by the ballot language actually enacted, is no longer is a part of the code section.[4]

We will not read the statute so as to abrogate, rather than effectuate, the clearly expressed views of the voters.[5] The procedure herein used (noticed hearing) conforms to the current statutory requirements, and no more is needed. As another court has held:

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2 "As both parties appear to acknowledge in their letter briefing . . ., a new disposition may be ordered under the current version of section 777 upon proper proof that a minor has violated an order of the court." (*In re Pedro M*. (2000) 81 Cal.App.4th 550, 555, fn. 2.)

3 The new provisions became effective March 8, 2000, and were thus properly applied to the hearing and disposition of Andre's present case. (*In re Melvin J*. (2000) 81 Cal.App.4th 742, 758.)

4 The Deering's citation, in the current bound volume, is correct. (Deering's Ann. Code Welf. & Inst. § 777, subd. (a)(2) (2001 ed.) p. 401.)

5 No question is raised as to the constitutional validity of this part of Proposition 21. While other parts of Proposition 21 have been asserted to be invalid, the provisions here

> "[W]e find that the new version of Welfare and Institutions Code section 777, subdivision (a) deletes the requirements that the court find (1) the previous disposition has not been effective in the rehabilitation of the minor, (2) the prior dispositional order had entirely failed, and (3) a more restrictive level of confinement was necessary to the minor's rehabilitation, and also eliminates the standard of beyond a reasonable doubt." (*In re Melvin J., supra,* 81 Cal.App.4th at pp. 758-759.)

Because the order of commitment was made in this case only after a hearing and a proper notice of probation violation, thus meeting the requirements of current law (see new § 777, subd. (a)(2)), no new section 777 petition was required, as was formerly the case. The current legal requirements were properly met in this case.

B. Absence of Current Social Study

Andre also argues his commitment was improper because a current social study had not been prepared for the January 11, 2001 hearing. The social study prepared for a July 12, 2000 hearing, recommending CYA commitment, was considered, and the court also considered an updated "Violation of Probation Report," a document required by new section 777, fulfilling the same function as an updated social study. The court read and considered defense counsel's memorandum in support of an alternative placement (that is, other than CYA) also, and considered other material bearing on Andre's then-current suitability for placement.

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in question would be unlikely to be affected thereby, in light of Section 38's severability clause, providing that any provision of Proposition 21 found to be unconstitutional or invalid was to be severable from the rest of the proposition. (See *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 82.)

Andre had, of course, been in continuous custody since preparation of the July 2000 social study, and the violation report accurately portrayed relevant events after that time. This appears to be precisely the situation envisaged by the amended provisions of section 777, discussed above. As the documents before the referee provided him with a complete picture of Andre in accordance with statutory requirements, we decline to find error, and thus do not address the question of under what standard such error, were there any, might be evaluated.

C. Exercise of Independent Discretion

Andre also argues that the referee hearing this case did not in fact exercise his independent judgment (discretion) but merely automatically imposed a previous CYA commitment which had been made, and then stayed, by Judge McAdam. We do not so read the record.

The social study prepared for the August 28, 2000 hearing had recommended, as had earlier ones, that Andre be placed in CYA. At the August 28 hearing, however, Judge McAdam began proceedings by saying that he had earlier felt Andre "had put himself in a position that the California Youth Authority was the only place for -- placement," he had noted a "marked change" in Andre, and despite the People's belief Andre ought to be committed to CYA, the court stated: "Andre, I'm not going to send you to CYA today because I've noticed a real improvement . . ."

In later proceedings, the court expressly declined to impose (and presumably then stay) a CYA commitment, instead committing Andre to YCC. The court did note also,

however, that should Andre fail at YCC "there clearly will be a factual basis for a commitment to the California Youth Authority."

Although the point is vigorously argued by appellate counsel, we cannot read into the referee's later allusion to Judge McAdam's remarks an indication the referee felt he was *compelled* to impose a CYA commitment by what McAdam had said. Instead, the referee quite clearly pointed out the relevant fact that Andre had been explicitly told what the consequences of failure at YCC would be. All that the referee's remarks indicate is that, as Judge McAdam had realized in August, Andre had run out of alternative possibilities with his YCC commitment, and a failure in the YCC placement by Andre would leave the court, as it eventuated, with no viable possible alternative than to impose a commitment to CYA.

In this case, the evidence overwhelmingly "demonstrate[s] probable benefit to the minor from commitment to the CYA and that less restrictive alternatives would be ineffective or inappropriate." (*In re George M.*, *supra*, 14 Cal.App.4th at p. 379.) Last, there can have been no possible prejudice from any procedural defect, were there to have been any, as no alternative placement than CYA is, in this case, even remotely possible.

As the prosecutor stated, Andre presented one of the clearest possible cases for a commitment to the California Youth Authority. The record compellingly supports this assertion, and we thus may not disturb the order below.

DISPOSITION

The judgment (order of commitment to CYA) is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.